LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 12 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 342

ROBERT N. BAEHR, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

In its brief in opposition to petitioners' application, respondent contends that the decision below is correct because "the courts will not interfere with discretionary acts of executive agencies respecting personnel matters" and because petitioners are allegedly seeking "to recover the salary of a position and grade to which they have not been appointed." These points are discussed seriatim.

1. This case presents a clear example of an abuse of discretion by an executive agency and an utter disregard of a prescribed statutory requirement. The Classification Act of 1949 *requires* the Civil Service Commission to follow the principle of "equal pay for

substantially equal work." The Commission is given no discretion in this regard. The *normal* means of achieving this Congressional mandate is through the machinery prescribed by the terms of the Classification Act itself including a procedural safeguard which allows any employee at any time to request the Commission to change the standard applicable to his position and, in the language of the statute, 5 USC, § 1101(b), "the Commission *shall* act upon such request." (Italics supplied)

Respondent's reliance on *Eberlein* v. *United States*, 257 U:S. 82; *Keim* v. *United States*, 177 U.S. 290; and *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.) is misplaced since discretionary acts were involved in those cases, unlike here. Similarly, *Cutting* v. *Higley*, 235 F. 2d 515 (C.A.D.C.) and *Wagner* v. *Higley*, 235 F. 2d 518 (C.A.D.C.) are not in point, because "notably different positions" were involved. More importantly, in these latter cases, the agency examined and compared the two positions in question and made a finding that they were substantially different. In the instant case, it is the arbitrary failure and refusal of the Civil Service Commission to reexamine its own standard as called for in petitioners' application that was complained of in the court below. If the Commission had fairly considered petitioners' argument and evidence as to the substantial similarity between their positions and those of the Veterans Benefits Authorizers, GS-11, in the Veterans Administration, then *Cutting* and *Wagner*, *supra*, might have some application. However, *this is* precisely what the Commission refused to do. On the contrary, the earlier finding of substantial similarity made by the employing agency (Petition, page 6, footnote No. 3) was never questioned by the Commission.

In these circumstances, the Court of Claims has clearly abdicated its jurisdiction in refusing to hear the case.

2. Respondent's second contention is treated in the petition (pages 8-9). Petitioners seek only the salary properly assignable to *their* positions as required under the clear terms of the Classification Act, not some other position.

CONCLUSION

Clearly, petitioners state a claim upon which relief could have been granted by the United States Court of Claims. It is particularly important that the jurisdiction of the Court of Claims be redefined by this Court since it is the only tribunal competent to grant relief against the United States in a great variety of actions such as the instant case. Moreover, the only appeal from that court is to the Supreme Court of the United States.

Accordingly, petitioners respectfully urge that their petition for a writ of certiorari be granted.

CARL L. SHIPLEY
THOMAS A. ZIEBARTH
1366 National Press Building
Washington 4, D. C.

SAMUEL RESNICOFF
280 Broadway
New York, New York

Attorneys for Petitioners

SHIPLEY, AKERMAN & PICKETT
1366 National Press Building
Washington 4, D. C.
Of Counsel